

[Cite as *State v. Silver*, 2017-Ohio-2660.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104749

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TERRELL SILVER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, VACATED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-600902-A

BEFORE: Laster Mays, J., Kilbane, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: May 4, 2017

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant, Terrell Silver (“Silver”), asserts that the trial court’s sentence is contrary to law, including the court’s order to pay costs without determining Silver’s ability to pay, and without imposing the costs in open court. We affirm the trial court’s findings, but vacate and remand for a nunc pro tunc entry solely on the issue of costs.

I. Background and Facts

{¶2} On November 13, 2015, Silver was indicted for having a weapon while under disability (R.C. 2923.13(A)(2)), and carrying a concealed weapon (“CCW”) (R.C. 2923.12(A)(2)). On December 16, 2015, Silver pleaded guilty to having a weapon while under disability, a third-degree felony punishable by a prison term not to exceed 36 months, a fine not to exceed \$10,000, or community control sanctions (“CCS”). The CCW was dismissed and a presentence investigation report ordered. The gun was also forfeited as part of the plea deal.

{¶3} Silver was sentenced on February 16, 2016, to the Community Based Control Facility (“CBCF”) for one year:

After consideration of the record, oral statements made today, the presentence, report, the purposes of principles of sentencing, the seriousness of recidivism factors relevant to this offense and this offender, and the need for deterrence, incapacitation, rehabilitation, restitution, it is

ordered defendant serve one year inactive supervision in the probation department.

Silver was also ordered to pay a suspended \$1,000 fine, reimburse the county for listed services and to pay court costs. The court reserved the right to punish CCS violations by a longer period of restriction or prison term. Finally, the court informed Silver that the penalties for violating the order would be a \$10,000 fine and a 36-month prison term.

{¶4} Silver was discharged from the CBCF program for allegedly assisting the escape of a CBCF resident, and taking a container of juice. The discharge constituted a probation violation. The court was informed during the May 12, 2016 violation hearing that Silver had successfully participated in several programs, obtained his GED, and completed nine clean drug screens during his CBCF term.

{¶5} Silver explained the violation to the trial court:

DEFENDANT: Yes, sir. I have no — I had no idea what that guy was going to do. I don't even know that guy.

As the surveillance [video] shows, you know, the gate was open. I had no access to unlock that gate or whatnot.

I was wrong, whatsoever, for going over there, you know, and grabbing beverages to drink or whatnot.

You know, I just — I don't — I really don't know how to explain it. Like, I know it looks bad, you know, but I deny helping that guy escape. I'm not going to look out for no guy and be his lookout if I'm not going to run with him.

Like, I have approximately weeks to complete the program. I have a family to get home to. I'm not about to help nobody escape. I don't even know that guy.

I'm pretty sure it looks bad, you know, and I was wrong for being in that area and actually taking the juice, and that might be a minor sanction, also.

As far as helping that guy escape, I had no idea what that guy was going to do.

COURT: Thank you, Mr. Silver.

(Tr. 14-15.)

{¶6} The court ordered that Silver serve the 36-month prison term, with 169 days credit. Postrelease control of “up to three years as determined by the parole board” was also imposed, and Silver was advised that “the court having jurisdiction of that new felony may extend the stated prison term” for an additional term of nine to 18 months. The court also ordered that terms imposed by another court for violations in the case during postrelease control are a part of the sentence in the instant case.

II. Assignments of Error

A. Appellant's sentence is contrary to law

{¶7} The Ohio Supreme Court recently clarified the current standard for appellate review of felony sentences:

Applying the plain language of R.C. 2953.08(G)(2), we hold that an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law. In other words, an appellate court need not apply the test set out by the plurality in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

State v. Marcum, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

{¶8} While recognizing the trial court’s broad discretion in imposing sentences within the statutory range,¹ Silver argues that the trial court’s three- year sentence for having a weapon while under disability was excessive, particularly where based on a questionable probation violation. Specifically, the trial court failed to engage in a proportionality or consistency analysis, as well as the considerations of R.C. 2929.12, resulting in a sentence that is contrary to law.

{¶9} R.C. 2929.11 provides in part:

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

{¶10} Silver further argues that the trial court should have recited the grounds for imposing the sentence in light of Silver’s minimal criminal history, pursuant to R.C. 2929.12:

¹ *State v. Pluhar*, 8th Dist. Cuyahoga No. 102012, 2015-Ohio-3344.

Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism, and the factors set forth in division (F) of this section pertaining to the offender's service in the armed forces of the United States and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

{¶11} There is no mandatory duty for a trial court to explain its analysis of the statutory sentences pursuant to our holding in *State v. Kronenberg*, 8th Dist. Cuyahoga No. 101403, 2015-Ohio-1020, ¶ 27. In addition, a trial court is only required to indicate that the statutory factors have been considered. *Id.*, citing *State v. Kamleh*, 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061, ¶ 61.

{¶12} At Silver's original sentencing hearing on February 16, 2016, the trial court included in its journal entry that "[t]he court considered all required factors of the law" in determining that community control probation sanction would adequately protect the public. The court also clearly explained the ramifications of a violation of the court's order.

{¶13} During the violation hearing in May 2016, after counsel for Silver advised the court of Silver's progress at CBCF, and Silver informed the court that he had no involvement with the escapee's efforts and would not have helped someone escape while he remained detained, the trial court's response was "thank you," followed by sentencing:

COURT: The Court finds that the defendant was placed under community control for a period ending February 16, 2017, and was notified at that time that a violation of the community control order could result in imprisonment for up to 36 months.

The [c]ourt finds that the defendant has violated the terms of the community control sanctions by being discharged from the CBCF.

It is ordered the defendant serve a stated term of 36 months in prison on the sole count of his case.

The defendant is ordered conveyed to the custody of the Ohio Department of Rehabilitation and Corrections forthwith.

Credit is granted for 169 days spent in custody in this case prior to sentence, together with future custody days while the defendant awaits transportation to the appropriate state institution.

Upon completion of the prison term, the defendant shall be subject to a period of postrelease control of up to three years as determined by parole board.

For commission of a felony while on postrelease control, the court having jurisdiction of that new felony may extend the stated prison term for a further period of not less than nine months or more than 18 months as provided by law.

Such additional periods of time imposed by another court for violations in this case while on postrelease control are part of the sentence in this case.

(Tr. 15-17.)

{¶14} The trial court's journal entry states, in part:

Defendant in court. Defendant indigent; attorney [Defense Counsel] assigned and present. [Probation Officer(s)] present. [Court Reporter] present. Defendant, Terrell Silver, in open court represented by counsel for hearing on alleged violation of community control sanctions. Hearing had. Court finds defendant, Terrell Silver, to be in violation of community

control sanctions. Defendant's community control sanction(s) in this case is/are terminated. It is therefore, ordered that said defendant, Terrell Silver, is now sentenced to the Lorain Correctional Institution for a term of 36 month(s). Defendant to receive jail time credit for 169 day(s), to date and any time until defendant leaves for the institution. Postrelease control is part of this prison sentence for up to [three] years for the above felony(s) under R.C. 2967.28. Defendant advised that if/when postrelease control supervision is imposed following his/her release from prison and if he/she violates that supervision or condition of postrelease control under R.C. 2967.131(b), parole board may impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed upon the offender. The court hereby enters judgment against the defendant in an amount equal to the costs of this prosecution.

{¶15} The trial court thoroughly addressed the factors set forth in R.C. 2929.11 and 2929.12 at the original sentencing. The court also entertained the update by Silver's counsel of the successful accomplishments of Silver during his term at CBCF. Silver denied assisting the escapee at CBFC, explaining that he would not have assisted an escape and remained in the facility, and that he only had months until completion of the CBCF program. Therefore, the record also reflects the trial court's consideration of any mitigating factors prior to sentencing.

{¶16} Accordingly, we find no merit to Silver's first assignment of error.

B. The trial court erred by imposing costs where it found appellant indigent, did not impose costs in open court and failed to consider his inability to pay.

{¶17} Silver argues that the trial court did not impose costs in open court, and failed to address the possibility of imposing costs at the May 12, 2016 sentencing hearing.

Clearly, Silver argues, the trial court recognized his indigence in light of the trial court's appointment of appellate counsel based on Silver's indigence.

{¶18} Under R.C. 2947.23, court costs are imposed on a criminal defendant; however, a trial court has discretion to waive costs, upon motion, under R.C. 2949.092. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8.

{¶19} While the trial court stated at the original sentencing that the penalty for violating the court's sentencing order would include a 36-month prison term and a \$10,000 fine plus costs, the trial court did not advise Silver in open court that costs would be imposed at the violation hearing. A community control violation hearing is effectively a second sentencing hearing where the court "sentences the offender anew and must comply with the relevant sentencing statutes." *State v. Heinz*, 146 Ohio St.3d 374, 2016-Ohio-2814, 56 N.E.3d 965, quoting *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995.

{¶20} Thus, the trial court is required to have the record reflect what it actually decided. A nunc pro tunc entry shall be used to correct the imposition of cost. Therefore,

[a] nunc pro tunc entry can be used to correct mathematical calculations and typographical or clerical errors, i.e., "a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision [**5] or judgment." *State v. Spears*, 8th Dist. Cuyahoga No. 94089, 2010-Ohio-2229, ¶ 10; *State v. Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705, 940 N.E.2d 924, ¶ 15, quoting *Zaleski* at ¶ 19. However, proper use of a nunc pro tunc order "is limited to memorializing what the trial court actually did at an earlier point in time, such as correcting a previously issued order that fails to reflect the trial court's true action," *Spears* at ¶ 10, "not what the court might or should have decided or what the court intended to decide." *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 18. A nunc pro tunc entry relates back to the date of the original entry. *Marsh* at ¶ 15. *State v. Thompson*, 8th Dist. Cuyahoga No. 104226, 2016-Ohio-7404, ¶ 8.

III. Conclusion

{¶21} The trial court's judgment is affirmed and vacated. The matter is remanded for the limited purpose of vacating the imposition of costs through the issuance of a nunc pro tunc entry.

It is ordered that the appellee and appellant split costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR